**Moveable Transactions (Scotland) Act 2023**

**Consultation – Claim and Property Categories**

**Response – November 2023**

This response is provided by Dr Alisdair MacPherson, Professor Donna McKenzie Skene and Dr Chike Emedosi. We are all members of the Centre for Scots Law at the University of Aberdeen.

**Q1. Are there any categories which are missing? If yes, please set out the categories.**

We consider that the inclusion of asset categories will assist third parties examining the register and considering entering into transactions with a particular party, and will support future data gathering and research regarding the types of property affected. However, the current categories do not necessarily cover all types of relevant assets. We favour a broader range of categories than those currently proposed, to minimise ambiguities and overlaps that may lead to errors and inaccuracies and thus ineffectiveness (see e.g. Moveable Transactions (Scotland) Act 2023, ss 27-28, 92 and 94) and to ensure that all relevant types of assets are appropriately covered. With narrower and incomplete categories there is a risk of uncertainty as to which of them, if any, are applicable to particular types of property and this may increase costs and errors. Parties using the register will ordinarily have to carry out further enquiries or investigations if the register discloses that property of a type they are interested in has been assigned or encumbered. As such, if a broad category has been selected and someone searching the register is considering entering into a transaction involving some property in that asset category, they should enquire or investigate further regarding the precise scope of the assignation or security.

It should be possible to select multiple categories, as there may be assets that encompass more than one category. There may, however, be questions whether the selection of inapplicable categories could ultimately lead to the assignation or security being rendered ineffective.

There should be a separate “other” or “miscellaneous” category with the possibility for a brief description, to ensure that assets that do not neatly fit into the other categories are catered for.

Given the inclusion of “all present and after-acquired property” for encumbered property categories, it may also be logical to include an equivalent for claim categories, e.g. “all present and after-acquired claims”. While there could also be separate categories of “all present claims/property” and “all after-acquired claims/property”, this would overly complicate the categories and it would be unlikely for such assets to be divided in this way.

In terms of all relevant categories, the following may be appropriate:

Claim categories – (i) book debts (or, as an alternative, payment rights for goods or services); (ii) bank account claims; (iii) rents or other monetary rights relating to land; (iv) payment rights relating to intellectual property; (v) other/miscellaneous claims; (vi) all present and after-acquired claims.

Encumbered property categories – (i) corporeal (moveable) property; (ii) intellectual property or assets relating to intellectual property (e.g. applications or licences); (iii) financial instruments; (iv) other incorporeal (moveable) property; (v) all present and after-acquired (moveable) property.

While we have a slight preference for the inclusion of “all present and after acquired claims/property” categories, it could be queried whether such categories are necessary.

The inclusion of financial instruments as an “encumbered property” category depends upon whether there is legislation to enable a statutory pledge to be created over such property.

If it is considered desirable to divide up corporeal moveable property into separate categories, perhaps “stock” and “plant, machinery, equipment and/or vehicles” would be the best way to divide them, i.e. to include items intended to be disposed of by a business and those used for the purpose of running the business. However, there would be a danger of overlap, e.g. a business that not only sells vehicles but also uses them for business operations.

It can be noted that there is precedent for categories such as intellectual property and book debts in the context of secured transactions. If security was created by a company over such property or other specified property, then registration was required under the previous registration of charges regime – see Companies Act 2006, ss 860 (for England and Wales) and 878 (Scotland) (now repealed). (See Companies Act 2006, s 859A onwards for the current regime, which does not rely on such categories.)

**Q2. Are there any categories you consider unnecessary? If yes, please give your reasons.**

See our answer to Q1 above.

**Q3. Are the descriptors used for any of the categories ambiguous or otherwise unclear? If yes please say in what way and how they might be improved.**

Yes, some of the categories are ambiguous, unclear and potentially involve overlaps. The claim categories do not seem to cover all possible types of claims (as noted above). Royalties does not necessarily encompass all claims relating to intellectual property. Also, “invoices for goods or services” are not technically a type of claim, as an invoice is merely a document used to request the payment of a claim. However, we recognise that invoices are often referred to in practice to mean the relevant claims. More significantly, claims can exist without accompanying invoices and a claim may not be for goods or services.

For encumbered property categories, the boundaries between “motor vehicles”, “plant and machinery” and “equipment” are not always obvious. For instance, a motorised vehicle used for industrial activities could also be considered a piece of plant or machinery and even a piece of equipment too, depending upon how it is used. The reference to “financial property” would seem to involve incorporeal (intangible) property, but there is a separate “intangible property” category. Incorporeal property is a more suitable technical term in Scots law; however, it is unclear whether it or intangible property would be more understandable to non-lawyers.

See also our answer to Q1 above, which would seem to be a more suitable approach.

**Q4. Do you consider that any of the descriptions require to be further defined? For example, would it be useful or beneficial to replace the over-arching category of ‘Royalties’ with specific examples such as ‘Trademarks’, ‘Patents’ or ‘Copyrights’ etc.**

See our earlier answers. Royalties may not capture all claims relating to intellectual property and we would prefer alternative categories anyway.

**Q5. In other jurisdictions where it is relatively common to include an “all present and after-acquired property” they sometimes include a variation on that theme in terms of “all present and after-acquired property except…” or “all present and after-acquired property relating to…”. Would this be helpful? Please give your reasons.**

It would be possible to include such a provision in relation to the other individual categories of property. However, this will multiply the categories and may be overly complicated. In addition, if a relevant property category is selected, this will put a party seeking to enter into a transaction involving property in that category on notice and to undertake further enquiries as to whether all property in the category is already encumbered or only some of it. As such, including categories for e.g. “all present and after-acquired” motor vehicles or plant and machinery or equipment etc would not be particularly useful.

It might be difficult to construct a suitable category that comprises of all present and after-acquired claims/property subject to some exceptions. Instead, parties could just select all other categories and then provide a brief explanatory note under e.g. the “other” category, if such a facility is made available. Alternatively, a general box could be included to allow for the provision of more information, or such a box could be connected to the all present and after-acquired claims/property category, so that further details can be provided.

**Q6. One particular issue which has arisen is whether a distinction between, on the one hand, an assignation over the entire book debt of the assignor and on the other hand, an assignation of a specific set of invoices from named debtors of the assignor is required. Again, your views on the need for such a distinction are welcome.**

See our answers to the earlier questions. As mentioned, we think consideration should be given to the inclusion of an “all present and after-acquired claims” category, but this would extend significantly beyond the extent of the assignations in this question. If there is to be a book debts category, as well as a general box allowing for further information to be entered, a distinction could be drawn between the two assignations in the question. However, we question whether it is truly necessary for such distinguishing details to be provided.

**Q7. What are your views on the need to provide a unique numerical identifier (where relevant)? It would helpful if you can give reasons for your response.**

We support the requirement for a unique numerical identifier to be provided where applicable. This is most obviously the case for VINs for motor vehicles. We agree that if the security is to relate to future property for which there will ultimately be unique numerical identifiers, then such numerical identifiers should not need to be provided when they are subsequently known. A contrary approach would undermine the creation of security over certain types of future property.

**Q8. Are you aware of other types of property which would have a unique identification number?**

We note that patent registration numbers are subject to change as the application progresses; however, the position changes once the application process is completed. As such, if a statutory pledge is to be granted over a registered patent, it may be desirable to require the relevant registration number to be included.

**Q9. Do you have any comments about this proposed approach?**

We consider that where the relevant information exists, it should be mandatory to include it. We cannot see why this would be problematic and it would maximise consistency.